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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MITCHELL WALTER KOBLIS,

Defendant and Appellant.

H034686

(Santa Clara County

Super. Ct. Nos. CC822828, CC827832)

Mitchell Walter Koblis (defendant) pleaded no contest on June 2, 2009, in case number CC822828 to one count of diversion of construction funds (Pen. Code, § 484b, count one), and one misdemeanor violation of Business and Professions Code section 7028, subdivision (a) (contracting without a license, count two). In case number CC827832, defendant entered no contest pleas to one felony violation of Business and Professions Code section 7027.3 (fraudulent use of a contractor's license, count one), a misdemeanor violation of Business and Professions Code section 7027.1, subdivision (a) (advertising without a lawful license, count two), one misdemeanor violation of Business and Professions Code section 7028, subdivision (a) (contracting without a license, count three) and one misdemeanor violation of Business and Professions Code section 7159.5, subdivision (a)(3) (excessive down payment in contract, count four). Defendant entered

his pleas in response to the court's indicated sentence of six months in county jail with eligibility or recommendation for the electronic monitoring program (EMP).

On July 24, 2009, the court suspended imposition of sentence and placed defendant on probation for three years. Defendant was ordered to serve six months in county jail with a recommendation for the EMP and with credit for time served on both cases of 14 days. The court ordered that defendant pay various fines and fees.

Thereafter, on September 9, 2009, defendant filed a notice of appeal from each case challenging events based on the sentence or matters occurring after the plea.

We appointed counsel to represent defendant in this court. Counsel filed an opening brief that stated the facts, but raised no specific issues.

On December 8, 2009, we notified defendant of his right to submit written argument on his own behalf within 30 days. To date, we have not received a response from defendant.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we have reviewed the entire record and have concluded that with the exception of one error that we will address below, there are no other arguable issues on appeal. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the . . . procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.)

### *Facts*<sup>1</sup>

In case number CC822828 there are no background facts other than those contained in the probation report, which reveals that the victim was Shellie Barber, but the defendant repaid Ms. Barber \$1400 approximately two months before the probation officer contacted her.

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<sup>1</sup> Since there was no preliminary hearing, we take the facts from the probation officer's report in this case.

In case number CC827832 Ravisankar Shanmugam stated that the defendant had presented himself as a licensed contractor, and initially seemed to be "good and honest." Mr. Shanmugam hired defendant, but before the job was finished defendant asked for payment in full. Mr. Shanmugam paid defendant approximately \$23,000. After this payment, defendant slowly stopped coming to Mr. Shanmugam's house to complete the work. When defendant asked for additional money, Mr. Shanmugam refused.

At the time defendant stopped work, the job was about 40 percent completed. Subsequently, Mr. Shanmugam had to hire another contractor to finish the work, most of which had to be redone.

### *Procedural History*

The Santa Clara County District Attorney filed a felony complaint on October 23, 2008, in case number CC822828 alleging one count of diversion of construction funds (Pen. Code, § 484b, count one), and one misdemeanor violation of Business and Professions Code section 7028, subdivision (a) (contracting without a license, count two). On December 9, 2008, the district attorney filed a felony complaint in case number CC827832, in which defendant was charged with one felony violation of Business and Professions Code section 7027.3 (fraudulent use of a contractor's license, count one), a misdemeanor violation of Business and Professions Code section 7027.1, subdivision (a) (advertising without a lawful license, count two), one misdemeanor violation of Business and Professions Code section 7028, subdivision (a) (contracting without a license, count three) and one misdemeanor violation of Business and Professions Code section 7159.5, subdivision (a)(3) (excessive down payment in contract, count four).

On June 2, 2009, after informing defendant that the maximum penalty he could receive for the two cases would be three years and eight months in state prison, the court outlined its offer to the defendant. To wit, six months in county jail with a recommendation for the EMP.

For each case, defendant executed an "ADVISEMENT AND WAIVER OF RIGHTS (FELONY)" form in which he was advised of his privilege against self-incrimination, his right to confront his accusers and his right to trial by jury as required by *Boykin v. Alabama* (1969) 395 U.S. 238, and *In re Tahl* (1969) 1 Cal.3d 122, and his right to subpoena witnesses in his own defense. Defendant's initials and signature appear on the forms indicating that he had read the front and back of the form, had had enough time to speak to his attorney, his attorney had explained to him his rights, defenses and possible consequences of his plea, "including the consequences explained on the second page of this form." Defendant's signature acknowledged that he was entering his plea freely and voluntarily.

On the back of the form, the advisements included fines and restitution that the court could order, terms of probation, what would happen if defendant violated probation, immigration consequences of his plea, the consequences of a serious felony conviction in terms of the three strikes law, and limitations on custody credits. By signing the form defendant acknowledged that he was sober and had not recently consumed any drugs or alcohol that affected his ability to understand the proceedings.

The court advised defendant that as a result of his convictions he would be barred from owning a firearm or ammunition for the rest of his life and would be required to provide saliva, print and blood specimens. Thereafter, the court asked defendant if he had read and understood the forms he had signed. The defendant confirmed that he had. The court asked defendant if he had questions. Defendant confirmed that he did not. Then, the court asked defendant if they were his initials and signature on each form. Defendant confirmed that they were.

Thereafter, the court asked defendant "based on the information on each of the forms" how he wished to plead in both cases. Defendant entered pleas of no contest to all counts in both cases. Defense counsel concurred with her client's pleas and waivers. Counsel stipulated to a factual basis contained in the investigation reports in each of the

cases. The court accepted defendant's pleas and found that defendant had "knowingly, intelligently and understandably waived his rights," understood the nature of the charges, consequences of his pleas and that there was a factual basis for the pleas in each case.

Defendant waived time for sentencing, waived referral to the probation department, but with notification to the victims and entered an *Arbuckle* waiver.<sup>2</sup>

### *The Sentencing Hearing*

As noted, the court suspended imposition of sentence and placed defendant on three years formal probation. Defendant was ordered to serve six months in county jail with a recommendation for the EMP. In addition, the court imposed various standard conditions of probation including that defendant submit his person, residence, vehicle and property to search at any time without a warrant, that defendant seek and maintain employment and maintain academic and/or vocational training.

The fines and fees that the court imposed in case number CC822828 included a \$200 restitution fund fine, plus a 10 percent penalty assessment; an additional probation revocation fine in the same amount, but suspended pursuant to Penal Code section 1202.44; a court security fee of \$40 pursuant to Penal Code section 1465.8.; a criminal conviction assessment fee of \$60 pursuant to Government Code section 70373; a booking fee of \$129.75 to the City of San Jose; and a \$10 fine plus penalty assessments pursuant to Penal Code section 1202.5.<sup>3</sup>

In case number CC827832, after ordering that defendant pay restitution to Mr. Shanmugam in an amount to be determined, the court ordered that defendant pay a \$200 restitution fund fine plus penalty assessments and a \$200 probation revocation fine plus

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<sup>2</sup> *People v. Arbuckle* (1978) 22 Cal.3d 749.

<sup>3</sup> The trial court announced a "10 percent fine plus penalty assessment, pursuant to Penal Code Section 1202.5." The clerk's minute order reflects that the fine is \$10 plus penalty assessments. Although normally the oral pronouncement controls (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186) where, as here, the governing statute calls for a \$10 fine for certain convictions, we must assume that the court misspoke.

penalty assessment, which the court suspended; a court security fee of \$80; a criminal conviction assessment fee of \$120; and a booking fee of \$129.50 to Santa Clara County.

### *Conclusion*

In examining the entire record, we found the following error in the court's minutes and orders of probation-error, which in the interest of judicial economy, we will correct without asking for supplemental briefing. Any party wishing to address them may petition for rehearing. (Gov. Code, § 68081.)

The order in case number CC822828 included a \$10 fine plus penalty assessments, which according to the court was imposed pursuant to Penal Code section 1202.5. Penal Code section 1202.5 provides in relevant part: "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars (\$10) in addition to any other penalty or fine imposed." Defendant was convicted of a violation of Penal Code section 484b, which is not listed in the above referenced statutes.<sup>4</sup> A statute's plain meaning controls our interpretation unless its words are ambiguous. (*Green v. State of California* (2007) 42 Cal.4th 254, 260.) Since the statute applies to only certain enumerated offenses and the Legislature chose not to include Penal Code section 484b within that list when it could have done so, we conclude that no fine attaches to a violation of Penal Code section 484b. Accordingly, the order in case number CC822828 must be modified by striking the Penal Code section 1202.5 fine.

We find no other arguable error that would result in a disposition more favorable to defendant.

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<sup>4</sup> Defendant was *not* convicted of a violation of Penal Code section 484, subdivision (b).

*Disposition*

The order of probation in case number CC827832 is affirmed. The order of probation in case number CC822828 is modified as set forth above. The trial court is directed to prepare new minutes and new orders of probation reflecting this modification. As so modified, the order in case number CC822828 is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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McADAMS, J.